No. 10458

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

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JURISDICTION

This is an appeal by the United States from a judgment against it for the proceeds of a policy of yearly renewable term insurance.

Whether the District Court had jurisdiction is one of the questions presented by the appeal for decision by this court. The governing statute is Section 19 of the World War Veterans' Act (38 U. S. C. 445), and the jurisdictional question is whether the suit was brought within the time prescribed in that section. Otherwise, compliance with the statute, and hence jurisdiction, is not denied.

The jurisdiction of this court is conferred by 38 U. S. C. 445 and 28 U. S. C. 225. The judgment appealed from, entered on December 14, 1942 (R. 19),

became final upon denial, on February 1, 1943 (R. 22–23), of defendant's motion for judgment notwithstanding the verdict, or for a new trial (R. 20–22). Notice of appeal was filed on April 23, 1943 (R. 23–24), within the time provided in 28 U. S. C. 230.

STATEMENT

A policy of yearly renewable term insurance was issued to William V. Mahoney on December 7, 1917, and premiums were paid upon it until August 1, 1920. Protection under the policy expired on August 31, 1920, at the expiration of the grace period for payment of the premium due on the first day of that month (R. 10). Twenty-one years later, July 28, 1941, a claim for benefits under the policy was filed in the Veterans Administration, alleging that the insured became totally permanently disabled while the policy was in force. The claim was denied on November 3, 1941 (R. 10), and this suit was brought on November 19, 1941 (R. 2).

In an effort to avoid the bar of limitations, which otherwise would have fallen on July 3, 1931 (Section 19 of the World War Veterans' Act, *infra*), plaintiff alleged in its petition that the insured had been insane and incompetent continuously since May 22, 1920, and that he was rated by the Veterans Administration as insane and incompetent prior to July 3, 1931 (R. 4). In its answer, the Government denied the alleged occurrence of total permanent disability while the insurance was in force (R. 7), and likewise denied the allegations with respect to insanity and incompetency (R. 8).

Pursuant to pretrial agreement, the case was tried upon the issues of whether the insured was insane, or was rated by the Veterans' Administration as insane, on or prior to July 3, 1931,[1] and whether he became totally permanently disabled on or prior to August 31, 1920 (R. 11). A jury trial on these issues resulted in a general verdict for the plaintiff (R. 15), in addition to affirmative answers by the jury to special interrogatories as to whether the insured was insane on July 3, 1931,[2] and totally permanently disabled while his insurance was in force (R. 17). The judgment appealed from (R. 16–19) rests upon that ver-

[1] It may reasonably be doubted that insanity on this date would bring the case within the statutory exception. The limitations provision most favorable to plaintiff was enacted on July 3, 1930, providing that no suit would be allowed unless brought within one year from that date. As enacted on that date, the statute provided "insane persons * * * or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities." If the statute is interpreted as speaking as of the date of its enactment, as the language clearly warrants, it would mean persons who were then insane, that is on July 3, 1930. That view accords with the rule, usually governing exceptions in statutes of limitations in favor of persons under legal disability, that the exception is not applicable to disabilities arising after the limitations period had commenced to run. *DeArnaud* v. *United States*, 151 U. S. 483, 496; *Harris* v. *McGovern*, 99 U. S. 161, 167–168. However, the evidence with respect to July 3, 1930, is substantially the same as that relating to July 3, 1931, and hence, for the purpose of this appeal, the issue as made in the District Court may be accepted without prejudice to either party in this particular case.

[2] At the trial there was no evidence whatever relating to an administrative rating of the insured as incompetent prior to July 3, 1931, that contention apparently being abandoned entirely.

dict and, in this court, reversal of it is sought upon the ground that there is no substantial evidence to support a finding for plaintiff on either of the issues tried. The points were raised in the court below by the Government's motions for dismissal and for a directed verdict at the close of all the evidence, and its post-verdict motion for judgment, all of which were denied (R. 396–397, 19–23).

QUESTIONS PRESENTED

1. Whether there is any substantial evidence to show that William V. Mahoney was an "insane person," within the meaning of Section 19 of the World War Veterans' Act (38 U. S. C. 445), on July 3, 1931.

2. Whether there is any substantial evidence to show that William V. Mahoney was totally permanently disabled on or prior to August 31, 1920.

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act of October 6, 1917, and insured against death and permanent total disability (c. 105, 40 Stat. 398, 409; 38 U. S. C. 511) occurring during the life of the contract.

Section 13 of the War Risk Insurance Act (c. 105, 40 Stat. 399; 38 U. S. C. 426) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *.

Pursuant to this authority, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading, in pertinent part, as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Section 19 of the World War Veterans' Act, as amended July 3, 1930 (c. 849, sec. 4, 46 Stat. 992; 38 U. S. C. 445), provides, in pertinent part, as follows:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to

bring suit after the removal of their disabilities. * * *

ARGUMENT

Plaintiff's own evidence conclusively refutes its claims that the insured was totally, permanently disabled on or before August 31, 1920, and that he was insane on or before July 3, 1931

Plaintiff's evidence establishes that the insured recovered from an injury to his back, sustained in November 1918, and that after such recovery he was able to perform work of any character not involving heavy lifting or other strenuous physical exertion. So far as physical disability is concerned, the evidence establishes so plainly that he was able to work that we assume that no contention will be made to the contrary. At least, plaintiff's evidence shows that the insured worked regularly over a period of eighteen months subsequent to the lapse of his insurance, and that immediately thereafter he followed a course of vocational training for more than two years, and there seems to have been no evidence even intended to show that he was not physically able to carry on those undertakings.

Lay witnesses for plaintiff testified, in effect, that during the period of hospital treatment for his back injury the insured became nervous, irritable, and nonsociable; that his speech became rambling; and that such conditions continued over an indefinite period after his discharge from the service. The same witnesses declined, however, to characterize his condition as insanity, and the plaintiff's medical evidence establishes that he was not afflicted with a mental disability

of any character affecting his judgment or ability to work.

One of the plaintiff's two expert witnesses declined to express an opinion that the insured was insane at any time prior to 1934, upon the ground that available information (facts recited by plaintiff's counsel in a hypothetical question) provided a basis for nothing better than a "wild guess." Plaintiff's other medical expert testified that, in 1920 and thereafter until 1934, the insured was mentally ill, of unsound mind, by which he meant only that his "judgment, behavior, manner, or emotional reactions, one part of all of these things," were altered.

Finally, it is established by the plaintiff's evidence that long subsequent to the lapse of his insurance the insured became afflicted with epilepsy, possibly causing light attacks, not recognized as attacks by the insured or his wife, as early as 1925, but not manifesting itself in an attack of unconsciousness until October 1931, and not attended by any psychosis until after November 1932.

SUMMARY OF THE EVIDENCE [3]

Plaintiff introduced the official records of the insured's military service showing that he was a laborer by occupation, 21 years of age at the time of his enlist-

[3] The plaintiff introduced the Government's pretrial Exhibit No. 1, consisting of the Government's medical records pertaining to the insured, as well as certain depositions taken by the Government and, hence practically the whole of the evidence was introduced by the plaintiff. Accordingly, the text of this summary is devoted to a statement of the plaintiff's evidence, with references to the evidence introduced by the defendant restricted to footnotes and parenthetical statements.

ment on July 15, 1917, and that he was discharged on May 22, 1920 (R. 100). These records show that on November 11, 1918, three sacks of potatoes fell upon the insured's head (R. 103), causing simple fracture of a number of his vertebrae, apparently, the 10th, 11th, and 12th dorsal (R. 107–108, 109), and deviation of the 1st, 2nd, and 3rd lumbar, and possibly the 9th dorsal, (R. 119, 121). There was no injury to the spinal cord (R. 128).

On the date of the injury, a laminectomy was performed and in February 1919 a cast was applied (R. 114). In the summer of 1919, he was supplied with a brace to support his back (R. 115). Hospital treatment for him continued from the time of his injury to the date of his discharge from the service, with the exception of two furloughs from October 30, 1919, to January 10, 1920 (R. 110), and January 17 to 24, 1920 (R. 111).

With a cast or brace, he was able to sit up and walk about (R. 118), although unable to help himself in such matters as getting up and down, dressing or wrapping his leggings (R. 114, 116, 118, 128). The records contain a note that on April 7, 1920, he was "walking without a brace and he walks better" (R. 116). An absence of pain was noted as of August 22 (R. 124) and September 30, 1919, and on the latter date it was recorded that he "Eats & sleeps well" (R. 118). On February 28, 1920, extreme nervousness, bordering on hysteria, was noted (R. 119), but the Army records make no reference to nervousness on any occasion either before or after February 28, 1920.

Upon his own application (R. 102), he was discharged from service before the maximum improvement was obtained. Upon careful consideration of the evidence obtainable, including a critical examination of the insured, a board of medical officers found his disability at that time to be absence of motion in lower dorsal and lumbar region left, with marked scoliosis. The board estimated his disability as 80% for his prewar occupation of laborer (R. 103).

In 1919 or 1920, or both, the insured spent some time at home by reason of the death of his father. His service records show that both of his furloughs (October 30, 1919, to January 10, 1920, and January 16 to 25, 1920), were on account of the death of his father. Some of the lay witnesses testified that he was home on furlough in 1919, and others fixed the time as 1920. It is fair to assume, we believe, that he was home on both occasions.

A number of lay witnesses (three brothers and a sister of the insured) were called by plaintiff to describe his condition while he was home on furlough.

John H. Mahoney testified that when the insured returned home he met him at the train, finding him bent over and crippled, and wearing a brace around his body to support his back (R. 76); that the insured said his back hurt him; that he appeared to be in pain; and that he walked home instead of riding in a cab because he couldn't sit down in a cab (R. 75). This witness testified that during the insured's stay at home members of the family assisted him in shaving, dressing, and removing the brace and putting it back

on (R. 76). He further testified that the insured was changed considerably; that he was irritable and nervous, very touchy, and seemed to be bothered by everything; that he sat around the house with a stare on his face, frequently not answering until spoken to several times; that he seemed not to want to talk to anyone, and when talking his speech was rambling, and he would switch from one subject to another. He testified that the insured seemed to be unsociable, going down town only once in a while, and desiring to return home upon each occasion after about twenty minutes (R. 77–79).

The two other brothers and the sister testified substantially to the same effect regarding the appearance and conduct of the insured while he was home on furlough (R. 84–86, 88–89, 39–41).[4] As to whether he was suspicious of other people, the insured's brother, Francis, testified: "Yes, he was kind of funny that way" (R. 89). He explained, however, as follows:

> Q. * * * Now, did you notice any of those things when he was home there on the furlough?
>
> A. Well, when he was home on furlough, he was wearing the brace, you see, and he was sick.
>
> * * * * *
>
> Q. Did you notice that he kind of kept to himself?

[4] Some of the sister's testimony purported to relate also to the period after the insured's discharge from service in May 1920 (R. 40–41). It was ultimately developed, on cross-examination and redirect examination, however, that she did not see the insured after his discharge from service (R. 48–50), until a few weeks before the trial (R. 42).

A. Yes. He was in the house most of the time.

Q. Did he go out and associate with his friends?

A. No. When he was there at that time, it was winter and it was slippery, and whenever he would go any place, I would have to go with him to see that he would not fall down (R. 88–89).

A third brother, James, testified:

Q. Now, did you notice when he was home on the furlough that he was nervous and irritable?

A. He was not so much then, because he was—I would say he was ill then and spent a great deal of time in the bedroom in bed (R. 97).

The appearance and conduct of the insured upon his discharge from service in May 1919 were testified to on behalf of plaintiff by the insured's brothers, James and Francis, and his wife.

James testified that the insured was irritable, feeling that he was getting the worst of things; that he took no great interest in anything (R. 94); that his conversation slipped from one subject to another; that in general he was less sociable than before the War, having no real friends as he formerly had; and that there was a decided change in his feeling as to whether people were against him. He declined to agree, however, that there was an "entire" change in the insured's personality, testifying, "I would say there was a change in his personality" (R. 95). He also declined to agree that the insured was "suspicious of members of the family," testifying "I would not say he was suspicious, in those words * * * that he got the

worst of things * * * was the opinion that he expressed"[5] (R. 94).

Francis testified that after the insured returned from service he was irritable and awfully nervous and changed in manner, acting "funny, you know, and nervous," but was not irritable to the point of being unpleasant, "he was not so unpleasant" (R. 84). Pressed for an opinion as to whether the insured was sane or insane during the period of "about a year" (R. 83) after his return from service, this witness further testified:

> A. Well, does it have to be sane or insane?
>
> Q. Just answer the question, Mr. Mahoney.
>
> A. Well, of course, you know I would not know about that, because——
>
> Q. I asked you if you had an opinion, Mr. Mahoney.
>
> A. I think he was all right (R. 86).

The insured's wife testified that she was married to the insured on May 27, 1920, five days after his discharge from service; that she knew him before his enlistment, at which time he was in good health and employed as a bricklayer; and that she had kept in

[5] The testimony of this witness was taken by deposition on behalf of the defendant, and at the trial plaintiff introduced the cross-examination containing the testimony referred to in the text. On direct examination, later introduced by the defendant, the witness testified that when he returned from service the insured was "irritable and very nervous and quarrelsome." "I would say that it was due to the stress that he was in" (R. 320); but that he was personally neat and clean in appearance (R. 321). He testified that he had not formed an opinion as to whether the insured was mentally normal or abnormal (R. 322).

touch with him during his service. She testified that he was irritable, not as strong as he used to be, lighter in weight, and not really well; that he had a back injury that pained him at times (R. 31–33); and that for a period after his return from service he was employed by the Northern States Power Company, earning about $20.00 per week. (R. 34.)[6]

Plaintiff introduced the testimony of three witnesses, Abbott, Dooley, and Hennessy, who had been co-employees of the insured at the power company.

Abbott testified that he entered the employ of the company in February 1921, and was acquainted with the insured thereafter until the latter's resignation (R. 52). He testified that the insured was office boy, doing odd jobs around the office such as filing and making addressograph plates; that he was commonly known among the employes as "Dizzy Mahoney" (R. 53); that frequently he was found in some out of the way place, amusing himself by staring out of the window or playing with some small object, such as an eraser or a pencil; that he was peculiar in that he was

[6] The defendant called the custodian of the payroll records of the Northern States Power Company, who testified from the records that the insured was employed by that company from July 1, 1920 to December 31, 1921, under the title of office boy, and later clerk, for $75.00 per month. He received full pay for each of the months during that period, but the witness testified that no deduction would have been made for loss of time for a day or two because of sickness. He further testified that, while no records were available to show whether the insured lost any time in the year 1920, records for the entire year of 1921 showed that, during that year, the insured was absent on October 28, 29, and 31, and November 26 (R. 296–300).

by himself, didn't associate with fellow employees except to the extent that he did the work assigned to him, "and if you wanted him look for him and give him another job and he would complete that" (R. 54).

Dooley testified that he entered the employ of the company in October 1921 and was acquainted with the insured thereafter until the latter's resignation (R. 61). He testified that the insured performed the duties of office boy and some janitor's work such as cleaning up during the daytime and replacing light bulbs; that the work was distasteful to the insured, possibly regarded by him as being looked down upon and beneath his dignity; and that he came down to the storeroom, where the witness worked, "apparently to get away from that." He further testified that the insured seemed to be physically handicapped, and because he was an ex-service man "I probably sympathized with him"; that definitely he did not associate with other employees; and that he spent time in the basement or hiding in the vault so that the others could not find him (R. 63). He further testified that one Slocum, assistant superintendent, frequently engaged in heated argument with the insured which, on Slocum's part, was mostly kidding, or perhaps picking on the insured because he was easily picked on; that on one such occasion the manager told the insured, who weighed about 135 lbs., that he "had better lay off Slocum," who weighed about 250 lbs., and that the insured replied that "he would cut Slocum down to his size." This witness testified, further, that the insured thought Miss Brogan and Miss Tice,

employees of the power company, had a violent dislike for him and were trying to get his job or make life miserable for him (R. 64–65).

Hennessy testified that the insured worked, to a great extent, under his supervision; that he became acquainted with him through the American Legion and ex-servicemen's activities; that the Legion was then trying to find employment for everyone who had any connection with the War (R. 68–69); that the fact that the insured was an ex-serviceman had considerable to do with putting him to work and keeping him there; that the insured was an "aloner," frequently found staring out the window or into space; that he seemed to take a prejudice against certain people and was difficult to handle; that the insured was not discharged but left voluntarily, with a distinct feeling of relief on the part of the witness; and that, since the company rules are more stringent now than they were in 1920, he would not now hire a man of the insured's capacity as of 1920 (R. 70–72). Hennessy also testified, however:

> He came to work for us as a meter reader, and when he wasn't reading meters he was a general office man doing messenger or office-boy work, working on the addressograph and running errands, and various things of that kind. His work was satisfactory to a certain extent, but he had a peculiar temperament. My recollection is that anything I gave him to do, he would do; he was honest and conscientious. As soon as he had done what he was told to, he was hard to find; he would more or less leave the

office—not the building—you would have to go and find him.

* * * * *

Q. What would he be doing?

A. Just sitting and apparently thinking, kind of a blank expression on his face; but you would call him and he would be right back on the job again.

Q. Would you state as to the frequency of that hiding out?

A. I couldn't say. Of course, when he was reading meters, he would do a definite job at this. That would be about a week out of the month and then we would use him for a general office boy, and he wasn't around except when you went and found him.

Q. How about in reference to the accuracy of his work?

A. He was a very good meter reader. I don't recall any complaints about the accuracy (R. 69–70).[7]

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[7] Two other co-employees at the power company, Nels Nelson and Blanche Callahan, were called by defendant. Nelson testified that the insured acted just like any ordinary man "Sometimes * * * a bit grouchy"; that as to nervousness and conversation, he appeared to be all right; that "we kind of would kid him a lot, you know, but I naturally do that with a bell hop anyway;" that he did his work satisfactorily and was efficient except for physical defects, but "outside of that, I couldn't say he was different from anybody else." He also testified that it was the custom of the company to start new employees in a position of the type held by the insured and give them a chance to work up to a better job (R. 304–306).

Miss Callahan testified that the insured worked in the same office with her, performing work for which the company always employed a person; that he seemed to perform his work satis-

The plaintiff introduced two medical reports of the insured's condition during the period of his employment at the power company. One was based upon an examination made on April 9, 1921. It discloses that his condition was then diagnosed as "Fracture of Vertebra Simple, 12th Dorsal 1st and 2nd Lumbar. Dislocation of Vertebra (Twelfth)" (R. 136). The prognosis was favorable. The report shows the examining physician's conclusion that the insured's physical and mental condition was such that vocational training was feasible, and "This man's condition is improving and with vocational training should be able to handle any clerical or similar work" (R. 136–137).

The other report was based upon an examination of the insured made on August 18, 1921. The diagnosis and prognosis were the same as that shown by the earlier report, except that the diagnosis contained the additional notation "Needs Dental Work" (R. 139). Again his physical and mental condition was found to be such that vocational training was feasible (R. 140).[8]

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factorily; and that she noticed no signs that he was mentally deficient (R. 307–308). The company records show that, promptly upon the insured's resignation, his position was filled (R. 301).

[8] The defendant introduced the testimony of Dr. McCammel, who made the examinations of April 9, and August 18, 1921. He testified, in effect, that no symptoms of nervous or mental abnormality were manifested at the time of either of these examinations (R. 343, 344, 348), and that on both occasions the insured's health was such that he was able to carry on the occupation of clerk, meter reader, janitor, or any light work "not entirely sedentary," not requiring too much heavy lifting or exertion (R. 343–344).

The insured apparently resigned his position with the power company to enter vocational training. It was testified that he resigned to go west (R. 308), and he in fact entered vocational training at Seattle, Washington, on January 9, 1922 (R. 141). It is shown by plaintiff's evidence that this training continued until May 8, 1924, with an interruption in January 1924 (R. 141), and that he completed a course in accounting (R. 171–172).[9]

The evidence of the insured's condition from 1922 to 1934, offered by the plaintiff, consists primarily of reports of medical examinations made during the interval between those dates and case history given by the insured and his wife, as recorded in reports of examinations made of the insured in 1932 and thereafter. In addition, plaintiff introduced lay testimony as to his appearance on a few short and widely separated occasions between 1922 and 1927.

The medical examination reports showed the following:

January 17, 1923. Diagnosis: Acute Rhinitis—Chronic catarrhal (R. 140).

January 18, 1924. No serious illness. No operations. Has had weakness in back (R. 141). Nervous System: Apparently normal (R. 143). Diagnosis: Fracture of spine. Ankylosis bony of spine. Atony (R. 143).

The insured was found to be unable to resume his prewar occupation on account of his spine, but his

[9] Records pertaining to his vocational training, introduced by defendant, likewise show that the period of vocational training was from January 9, 1922, to May 8, 1924 (R. 395–396).

physical and mental condition was found to be such that vocational training was feasible (R. 140–144).[10]

April 28, 1924. Complaint: "Stiffness and weakness in small of my back if I sit long at a time or walk very far. I am unable to do any lifting or hard work" (R. 147). "* * * complete rigidity of the spine involving the lower dorsals and the lumbar spine" (R. 148). "Nervous System: Negative" (R. 149). Diagnosis:

Fracture of spine.
Ankylosis bony of spine.
Atony muscles of back.
Atrophy muscles of back.
Curvature of spine (Kyphosis).
Curvature of spine (Scoliosis).
Hallux valgus.
Flat feet bilateral 1st degree.
Callosities.
Missing teeth, one.
Dental caries, two.
Gingivitis.
Astigmatism, compound, hyperopic.
Albuminuria (R. 150).

[10] Dr. Birchfield, one of three doctors who made the examination thus reported, was called by defendant. He testified: "There was no neuropsychiatric examination made. * * * The reason we didn't make one was this, because he gave us a very definite history in his own language, and it was so clear that there was no indication of any nervous or mental condition at that time, therefore he was not referred to a specialist" (R. 353). He also testified that the insured's health was such at that time that he was able to carry on the occupation of clerk, meter reader, janitor, bookkeeper, or any occupation that did not call for heavy manual labor (R. 353).

His physical and mental condition was found to be such that vocational training was feasible (R. 150).

February 11, 1925. No serious ilness since service (R. 151). Has had stiffness and weakness in back, with pains in loins after sitting for any length of time. Marked rigidity of the muscles of the spine with atrophy (R. 152). Nervous system normal (R. 153). Diagnosis: (See last diagnosis above—substantially the same.)

April 16–19, 1926. (Complete report, R. 154–160.) Complaint: "Pains thru back & hips when I sit down and get up—am all stiff." Diagnosis (R. 155). See last diagnosis above—substantially the same.

October 24 to November 1, 1932. Five or six convulsions in past year, causing unconsciousness. Exceptional condition, no other complaints. No treatment of any kind (R. 160). No hospitalization since discharge from service, but during past year four or five spells of some kind. The first one about a year ago (R. 163). "In the Mental Field, except for apprehension, and self-concern, nothing abnormal is elicited. He is quiet, pleasant, and cooperative" (R. 165). Epileptoid seizures strongly suggested by the history, but the findings do not warrant a diagnosis (R. 166). He was regarded by the examiners as competent (R. 168).[11]

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[11] Dr. Ernest, one of three doctors making this examination of the insured, was called by the defendant. He testified that the examination included complete neuropsychiatric examination—a study neurologically as well as mentally—and that there was nothing definite for any diagnosis in the neuropsychiatric field (R. 375). He further testified: "His mental condition at that time was perfectly normal except that he was somewhat

Reports of medical examinations made of the insured in 1934 and thereafter, introduced by the plaintiff, contain recitations of the case history as given by the insured and his wife. The history is to the effect that subsequent to completion of his vocational training in May 1924 the insured engaged in occasional odd jobs of bookkeeping, but was not otherwise gainfully employed; that he had been unable to do work requiring any great amount of strength because of his back injury; that he had lived on his compensation, plus his wife's earnings, and had squandered what little money he had in "gambling and dancing"; that seizures started over five years prior to the date of the examination (April 5, 1934),[12] at first occurring only

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apprehensive and was worried and self-concerned. * * * Then the thing that really mentally was bothering him was, he had told me that for the past year he had been having some kind of spells in which he would fall. * * * That was the real reason for his coming in. He was somewhat worried about these spells" (R. 376). He testified further: "His reactions I thought were pretty normal" (R. 380). "I didn't find anything in any examination to indicate that he didn't know exactly what he was doing. I think the evidence we have right here in the report is even better than opinion because he is clear in his understanding of what I wanted him to do and he gave a very good reason why he didn't want a spinal puncture, and certainly he would be able to know whether he had rights as an ordinary citizen would know them" (R. 381).

[12] In earlier statements regarding his attacks, given contemporaneously with the first medical consultation concerning them, it had been reported that the first attack occurred about October 1931 (R. 160, 163, 376; and see reference to medical examination of October 24 to November 1, 1932, *supra*.) The discrepancy in dates may be due merely to a fading of memory with the passage of time, or it may represent a belated belief by the insured's wife that he had mild attacks for a time be-

two or three times a year, but becoming more frequent during the past two years (R. 172). Aside from the seizures, it was reported by his wife, his back had bothered him a great deal, "although he had been fairly well physically," and during the last few years he became more irritable and quarrelsome, and commenced drinking to the point of becoming intoxicated. While intoxicated, he was especially quarrelsome and abusive to his wife (R. 173).

Subtantially the same history, recorded on another occasion in April 1934, contains the additional recitation that:

> There has also been an increasing irritability and antagonism toward his family. He has become somewhat careless in his appearance and habits and while formerly he was more or less sociable, of late years he has been inclined to be seclusive, staying by himself, frequenting pool halls and gambling houses. At one time he thought that his wife was untrue to him and the history shows that his own morals are not above reproach (R. 176).

On another occasion in 1934 it was recorded:

> The wife states that approximately ten or twelve years ago she noticed a decided change in his personality, that he was *beginning* to be irritable and fault finding. She states that he would wake up in the morning in a dazed condition. The wife said that the first seizure occurred approximately five or six years ago, but she thinks

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fore she became aware of them. Both of these possibilities are suggested by the evidence referred to in the two next succeeding paragraphs of the text.

he must have had them before from the way he acted (R. 178).

At the trial, the insured's wife testified that he had his first seizure about 1925, "or around in there. I am not very good at remembering dates," but that they were not frequent until after 1932 (R. 35, 36). She also testified that the insured has seizures now, is older, and not as strong as in 1920, and that otherwise his condition then and at the time of trial was the same (R. 33–34).

Francis Mahoney testified that he saw the insured once or twice about 1927 and that his condition was about the same then as it was in 1920 (R. 90–91). (As earlier pointed out, this witness, interrogated as to whether the insured was sane or insane in 1920, had testified, "I think he was all right" (R. 86).)

James Mahoney testified that he saw the insured occasionally in 1923 and a few times during a two-week visit in 1927, and that he thought his condition was practically the same on each of those occasions as it was in 1920 (R. 322–323). (As earlier pointed out, this witness had declined to characterize the insured as "suspicious of members of the family" in 1920 (R. 94); had likewise declined to agree with counsel that there was an "entire" change in the insured's personality during his military service (R. 95); and had not formed an opinion as to whether the insured's condition was normal or abnormal (R. 322).) [13]

[13] Defendant called three lay witnesses who had been acquainted with the insured during the period from 1922 to 1931. George Dunlap testified that he was the manager of an apartment house in which the insured and his wife lived from De-

The plaintiff introduced a number of reports of medical examinations of the insured, made in 1934 and thereafter, tending to show that mental deterioration by reason of epilepsy manifested itself as early as March 1934, with psychosis as early as October 10, 1935. Plaintiff also introduced a record of certain state court proceedings reflecting that the insured was found to be incompetent in March 1934.

The medical examination reports show that mental diagnoses of the insured's condition were made as indicated below. Of course, the spinal condition was diagnosed also, and minor conditions, such as absence of teeth, deviation of nasal septum, and flat feet were noted. It seems unnecessary to repeat these physical diagnoses here.

March 10, 1934. Epileptic deterioration (R. 293). (Dr. Evans, who made this diagnosis, was called by plaintiff. His testimony, pertaining, in part, to the distinction between mental deterioration and insanity, is summarized later.)

April 5 to June 10, 1934. (Hospital observation.) Epilepsy, petit mal (R. 130). A report of a single complete examination made during this period (R. 169–

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cember 1922 to May 1924; that he saw the insured frequently and talked with him occasionally; that he was neat and clean in appearance; that he acted just like anyone else, there being nothing peculiar in his conduct; and that, in his opinion, the insured was sane (R. 311–314).

Mrs. Peter Swanson testified that the insured lived in her house from 1924 to 1930; that he drank excessively at times (R. 330), but as a rule he appeared to be normal (R. 332).

Edgar Williams testified that he knew the insured and saw him during the years of 1929 to 1931; and that he observed nothing mentally wrong or abnormal about him (R. 332–333).

179) shows a diagnosis of epilepsy with deterioration from history. The final diagnosis of epilepsy petit mal is explainable, we assume, upon the grounds that during the time he was in the hospital he was considered competent (R. 179, 181, 179); that as the report reflects, he had no seizure from March 9 until May 25, 1934 (R. 177, 183); and that two attacks on May 25 and 26 were light, petit mal in character (R. 182, 183). Also, he was found to be neat in personal appearance, quiet, cooperative, pleasant and congenial, and he showed no evidence of active psychosis (R. 183).

October 10, 1935. (Single examination.) Epilepsy Grand and Petit mal, with psychotic episodes, psychotic at this time (R. 183). (This diagnosis was made by Dr. Ernest who, as earlier pointed out, participated in the examination of the insured in October and November 1932, and who testified that no mental abnormality was manifested in 1932 (R. 380); and that in his opinion the insured then knew exactly what he was doing, just the same as any ordinary citizen (R. 381)).

October 11, 1935–January 17, 1936. (Hospital observation.) Psychosis, epileptic deterioration (R. 130, 147).

February 29 to May 11, 1936. (Hospital observation). Psychosis, epileptic deterioration (R. 131.)

October 29 to November 5, 1937. (Hospital observation.) Psychosis, epileptic deterioration (R. 131, 215.) (Dr. Ernest also made the neuropsychiatric examination at this time (R. 212.) As to the difference between the insured's mental condition in 1932 and 1937,

he testified: "In the first one there was no evidence of any mental change, and in the last one he is definitely psychotic, with deterioration." As to that psychotic condition, he testified: "* * * it isn't difficult for anyone to note it. As a matter of fact, the psychoses are usually diagnosed by the family of the patient and the ordinary physician" (R. 384).)

On each of a number of occasions thereafter, until June 1939, the same mental diagnosis was made by Veterans' Administration doctors (R. 132–133), and Dr. Finley, plaintiff's witness, testified that he found the insured to be of unsound mind upon examination of him on December 9, 1942 (R. 265, 266). (But see Dr. Finley's explanation of what he meant by unsound mind (R. 275), and summary of his testimony, *infra.*)

The plaintiff introduced the record of certain proceedings had in the Circuit Court for the State of Oregon, showing that the insured was adjudged to be incompetent on March 9, 1934 (R. 281–291). That adjudication seems to have been based substantially, if not entirely, upon the findings of a physician who examined him on behalf of the court on the date of the adjudication (R. 285–288).[14]

The plaintiff introduced the testimony of Dr. Evans, who had diagnosed the insured's condition as epileptic deterioration on March 10, 1934 (R. 283). He

[14] Since July 3, 1931, is the latest date upon which the competency or incompetency of the insured has significance in the present case, careful consideration of the evidence relating to 1934 and thereafter is not regarded as necessary, and the Government, therefore, does not deny that the evidence would support a finding that he was incompetent from March 1934.

defined epileptic deterioration as a disease affecting the central nervous system, characterized by the typical convulsion and a change of character to the extent that the patient becomes more or less irritable and hard to get along with, and testified that in severe cases the patients become more or less impaired in mind, becoming "unable to put out the brain work they formerly did" (R. 238). He testified that he would consider the insured as insane, "mentally sick," at the time of his examination of him (R. 238), explaining that deterioration is a mental illness," but it is not psychotic" (R. 247); that deterioration alone, aside from psychiatric disturbance, would not constitute insanity, but that the insured manifested such disturbance on March 10, 1934 (R. 263).

Considering a hypothetical question embracing the plaintiff's version of some of the evidence (R. 240–242),[15] Dr. Evans testified to an opinion that the in-

[15] This question omitted reference to very substantial portions of plaintiff's own evidence, particularly the findings and absence of findings shown in the numerous medical reports of the insured's condition, both during and after his military service, tending to show that the insured had no nervous or mental disability. Since any opinion based upon the question would have been devoid of probative value unless the jury found the facts of the case to be in accord with those in the question, it would seem that counsel for plaintiff hoped that the jury would discredit all of the medical findings introduced by plaintiff. In view of the manner in which Dr. Evans answered the question, no point need be made of it, but in passing, doubt is expressed as to whether the jury might have been permitted to repudiate all the testimony of the plaintiff unfavorable to it, as would be necessary in order to attribute probative value, favorable to the plaintiff, to any answer to the hypothetical question.

sured's condition, as found in 1934, was the end results of his injury in 1918, explaining: "I would put it this way, that had that injury not occurred he would not have had his epilepsy, * * * I don't believe that any man is wise enough to say just when the mental involvement did actually start" (R. 244–245). He further testified that epileptic seizures due to trauma do not usually follow closely upon the injury, but generally occur some two or three years later (R. 253); that in his opinion, based upon the hypothetical question, deterioration has existed from some time prior to 1934 (R. 247), not "right from the start, but the deterioration was the end result of his change of character" (R. 255).

Distinguishing between deterioration and insanity or psychosis,[16] Dr. Evans testified that the information given him in the hypothetical question, plus that obtained upon his examination of the insured in 1934, provided the basis for nothing better than a guess as to when the insured became psychotic, and he repeatedly declined to express any opinion in that respect.[17]

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[16] In framing questions, counsel usually employed the term insanity, while the doctor answered by use of the term psychosis. Presumably the doctor regarded the word psychosis as more definitely descriptive of the condition constituting insanity in the medical sense. Compare the medical statement as to the meaning of insanity (R. 276).

[17] An opinion as to the insured's sanity or insanity was sought as to a number of different dates by resort to several variations of the question. To avoid the duplication, in effect, involved in referring to each instance separately, only typical answers are set forth here.

Thus, as to whether the insured was insane in May 1920, he testified that the hypothetical question would indicate something radically wrong with his mind (R. 244), but "there is a difference between being deteriorated and having a psychosis or being insane * * * On May 22, 1920, he might have had some deterioration and at the same time not be frankly insane or frankly psychotic. It is impossible for me to say" (R. 246). With respect to 1925, he testified: "I contend that he was deteriorated from an early date, but whether he was frankly psychotic in 1925 would be a wild guess on my part. I don't know" (R. 249). With respect to the year 1930, he testified "Again I will have to answer this last question the same as I did the prior one. I don't know", and after the question had been amended he continued:

> I would say that the changing personality, that he was a different man than he was formerly, leads me to conclude that for several years prior to the time that I examined him he was deteriorated and impaired in mind, but I am not wise enough to say when he had these delusions of persecution—when those things started in I don't know, and if you would ask me the question as to whether or not I *though* he was insane in 1933, again I don't know. It is a matter of opinion, and if I answered it I would have to guess. I am basing my answers on my experience in head injury cases. I am contending all along the man was injured mentally, that some damage certainly was done him, or he would not have developed this condition from which he still suffers, but whether he was

> frankly insane or not in those earlier years I just can't say (R. 250–251).

The plaintiff called Dr. Finley, who, upon the basis of a hypothetical question including the findings made by the witness upon examination of the insured on December 9, 1942 (R. 267–268),[18] testified:

> That in January, 1920, this man was at that time mentally ill, that is, the illness that he presented at the time I saw him was in existence at that time.
>
> Q. In your opinion would that individual be of an unsound mind at that time? A. Yes (R. 269).

On cross-examination, he testified that his opinion was based, in substantial part, upon the history of the case, obtained in connection with his examination in December 1942, and reflected by Veteran' Administration records, which he had examined, as well as the hypothetical question (R. 271, 273), and further testified:

> Q. You have given your opinion, Doctor. I am asking for the basis of it. What is there in the hypothetical question or in any information contained in the file or any information given by this man at this trial that indicates to you the condition of this man's mind from 1927 to 1934?

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[18] The considerations stated in footnote No. 15, *supra*, p. 27 are also applicable to this question. Moreover, the question to Dr. Finley required an assumption that the condition in 1920 was the same as that found by the doctor upon examination in 1942 and, in effect, therefore merely asked the doctor's opinion as to the condition which he found.

A. I know of none.

Q. And yet you continue to express your opinion that he was in that period of unsound mind?

A. That is my opinion.

Q. Doctor, what do you mean by "unsound mind"?

A. I mean by "unsound mind" an alteration either in the man's judgment, behavior, memory, or emotional reactions, one part of all of these things.

Q. Is unsound mind synonymous with insanity?

* * * * *

A. The term "insanity" is not a term that is used a great deal in medicine. It is a term that has a very loose meaning and it depends upon your definition of insanity whether it is synonymous with an unsound mind. If you mean by insanity any alteration in the personality, in the way of judgment, emotional reaction, behavior, memory, than it is. If you mean by insanity, as it is often used, that it is a severe type of emotional breakdown or mental deterioration, then it is a severe type of unsound mind (R. 275–276).

ANALYSIS OF THE EVIDENCE

The evidence in this case may be harmonized only with the view that the insured was neither totally permanently disabled prior to August 31, 1920, nor insane prior to July 3, 1931; that at least until 1934 his condition was, as concluded by Dr. Finley, nothing more than an "alteration" either in his "judg-

ment, behavior, memory or emotional reactions" (R. 275). All of the medical evidence, all of the lay testimony and record evidence concerning his pursuit of substantially gainful employment, and the conclusions drawn by lay witnesses from the symptoms to which they testified, tend to show the absence of total permanent disability and insanity as of the critical dates.

There remains only the testimony of lay witnesses to the effect that the insured was, upon specified occasions, nervous, irritable, and nonsociable, and that his conversation was rambling. That testimony was given from memory more than twenty years after the time to which it referred, and must be evaluated in the light of the facts, judicially recognized, that memories fade with the passage of time, and that dates and other details depending upon unaided recollections after the passage of years are uncertain. *Galloway* v. *United States,* 130 F. (2d) 467, 470 (C. C. A. 9), affirmed, — U. S. — (October Term, 1942, May 24, 1943, as yet unreported; *Cunningham* v. *United States,* 67 F. (2d) 714, 715 (C. C. A. 5); *United States* v. *Earwood,* 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 763; *United States* v. *Brown* 76 F. (2d) 352, 353 (C. C. A. 1).

Moreover, the lay testimony as to the insured's abnormal conduct describes only such symptoms as would ordinarily be regarded as normal incidents of the insured's long period of convalescence from physical injury. It is clear that the symptoms were most noticeable when the insured was home on furlough, months before he was sufficiently improved to be re-

leased from service. They were less noticeable when he was discharged from service in May 1920 at a time when, although his condition had improved, maximum recovery had not been attained. They seem to have been absent almost entirely after January 1922.

The symptoms observed at the time of the furlough were plainly regarded by the witnesses as temporary incidents of his physical illness. He "kind of kept to himself" because he was required to stay in the house most of the time (R. 88–89), "a great deal of the time in the bedroom in bed" (R. 97). Interrogated as to whether, at the time of the furlough, the insured was nervous, changed, and "funny," his brother, Francis Mahoney, volunteered the explanation: "A. Well, when he was home on furlough he was wearing a brace, you see, and he was sick" (R. 88).

The insured's brothers, James and Francis, who had seen him at the time of his furloughs, testified that he was also nervous, irritable, changed, and "funny" at the time of his discharge from service. Since they declined, however, to characterize him at that time as insane (R. 86, 321), entirely changed (R. 95), suspicious of members of his family (R. 94), or unpleasant (R. 84), it is plainly inferable that, to the best of their recollections, his symptoms were less noticeable in May 1920 than they were in the preceding January. James testified, in effect, that the insured had not fully recovered from his back injury at the time he returned from service, and that his nervousness then, as at the time of his furlough in January, was merely a temporary incident of his

convalescence. As to whether he was irritable or nervous in May 1920, he testified, "I would say it was due to the stress that he was in" (R. 320).

The testimony of the insured's wife has special significance in this respect. Apparently she did not see him when he was home on furlough; at least her testimony was confined to the period after his discharge from service in May. She referred principally to his physical injury at the time he returned from service, making only slight reference to nervous symptoms (R. 32–33). It is plainly inferable on the one side that her recollection was free from any confusing impression regarding the more noticeable symptoms manifested at the time of the furlough (attributable to the severe physical disability then existing) and, on the the other, that, in the minds of James and Francis, there was some failure to distinguish, after so many years, between January and May 1920. This is an example of the character referred to by this court in *Galloway* v. *United States, supra,* of the danger of confusing later conditions with earlier ones when resort is had to unaided recollections of occurrences long past.

It is significant, moreover, that the testimony of the insured's wife, who was in a better position than anyone else to know the facts during that period, was not elicited as to the existence or nonexistence, during the decade following his discharge from service, of symptoms of the character noticed by lay witnesses in January 1920. Compare *Galloway* v. *United States, supra,* and consider the testimony of lay witnesses for defendant to the effect that, during that period, the

insured appeared to them to be entirely normal (R. 311–314, 332–333). In giving the history of her husband's condition in 1934 (plaintiff's evidence), the wife stated that he had become more irritable and quarrelsome in recent years (R. 173), and that about ten or twelve years before 1934 he was only "beginning to be irritable and fault finding" (R. 178).

Finally, however—and we submit this alone is decisive against the plaintiff—the witnesses who described the insured's mental and nervous symptoms even during the furlough periods in 1919 and 1920 did not regard them as manifestations of a serious abnormality. One had no opinion as to whether the insured was sane or insane (R. 321), and another thought that he was sane (R. 86). He was not regarded by those closely associated with him as "entirely" changed, suspicious, or unpleasant (R. 84, 94, 95). Whatever inferences might be permitted to be drawn under other circumstances from such general terms as nervousness, irritability, rambling speech, and unsociability, it is plain here that they were intended to describe only eccentricities of conduct, falling short of mental derangement. In its ultimate effect, that is, this lay testimony regarding nervous and mental symptoms was intended by the witness to describe at most only an alteration in judgment, behavior, memory, or emotional reactions.

In addition, evidence showing that the insured was gainfully employed and thereafter followed a course of vocational training, aggregating nearly four consecutive years from July 1920 to May 1924, established conclusively that he was not totally permanently disabled

on or prior to August 31, 1920. Vocational training successfully pursued has been regarded as the equivalent of successful pursuit of a gainful occupation. *United States* v. *Kerr,* 61 F. (2d) 800, 802 (C. C. A. 9); *Nichols* v. *United States.* 68 F. (2d) 597, 598 (C. C. A. 9); *Blair* v. *United States,* 47 F. (2d) 109, 111 (C. C. A. 8).

On the issue of total permanent disability, the present case is governed, we submit, by the decision of this court and of the Supreme Court in *Galloway* v. *United States, supra.* In that case this court held that proof that the veteran had served in the Navy and the Army conclusively refuted any claim of earlier existing total permanent disability, and it characterized as a failure in the plaintiff's case the lack of any evidence of the veteran's condition over a period of ten years from 1922. The Supreme Court rested its decision upon the latter ground, without decision as to the former. In the present case, the insured's work for the power company and his vocational training are, at least, the equivalent of the Army and Navy service in the *Galloway* case. In the present case, there is an absence of evidence favorable to the plaintiff regarding the decade from 1922 equal to that in the *Galloway* case. In the present case, moreover, there is some evidence relating to that period, all of which tends to show the absence of total permanent disability.

The character of the evidence in the present case regarding the period between 1922 and July 3, 1931, is decisive against the plaintiff also on the issue of insanity as of the latter date. Witnesses who did not

regard the insured as insane in 1920 testified that he appeared to be about the same in 1923 and 1927. There is literally no other evidence to show that the insured's conduct or condition was abnormal in any respect between 1922 and July 3, 1931, when the right of suit upon his policy became barred, unless he was then an "insane person." And there is plainly no evidence to show insanity of the character required to avoid the bar of limitations. The term "insane," when used to describe persons excepted from the bar of limitations upon the bringing of suit, means mental derangement bearing a causal relationship to the failure to bring suit. *Clark* v. *Irwin,* 88 N. W. 783, 785–786; 63 Nebr. 639; *Cathcart* v. *Stewart,* 142 S. E. 498, 502; 144 S. C. 252. In the latter case it was stated:

> It is well settled that a man may be insane on one subject, but capable of transacting business on all others. There may be a partial derangement; yet capacity to act on many subjects may exist. The question in any case is not merely whether the party was insane at the time of the questioned transaction, but whether he was so insane as to be incapable of doing the particular act with reason and understanding.

See also: *United States* v. *Kiles,* 70 F. (2d) 880, 883 (C. C. A. 8).

There is no evidence in the present case to show that the insured was mentally disabled prior to July 3, 1931, to act intelligently with respect to his right to sue upon his insurance. Certainly mere alteration of the character attributed to the insured by Dr. Finley does not constitute such disability.

CONCLUSION

It is respectfully submitted that there is no substantial evidence to show that William V. Mahoney was totally permanently disabled on August 31, 1920, or insane on July 3, 1931, and that, accordingly, the judgment should be reversed with instructions to enter judgment for the Government.

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SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943